89-1902

No.

In The

Supreme Court of the United States

October Term, 1989

DENNIS E. PRYBA,
BARBARA A. PRYBA,
EDUCATIONAL BOOKS, INC.
and
JENNIFER G. WILLIAMS,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petition for Writ of Certiorari

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(16589)

QUESTIONS PRESENTED

1. Whether the inclusion of obscenity as a predicate offense under RICO (18 U.S.C. §1961 *et seq.*), or the application of RICO's forfeiture provisions upon an obscenity conviction, violates the First Amendment either as a prior restraint or as an overly broad and unconstitutional subsequent punishment.
2. Whether the Eighth Amendment requires a proportionality review before a criminal defendant's interest in a RICO enterprise is ordered forfeited.
3. Whether the admissibility of expert testimony in an obscenity case has been unduly limited.
4. Whether contemporary community standards should be measured by an acceptance or tolerance standard.
5. Whether the elements of 18 U.S.C. §1962(d) require a finding that a defendant personally agreed to commit two predicate acts.
6. Whether prior state court convictions are admissible against a defendant to prove the RICO predicate acts.
7. Whether the defendants' right to the due process of law under the Fourteenth Amendment was violated when the lower court denied them the right and ability to intelligently exercise their preemptory challenges.

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On April 9, 1990, the United States Court of Appeals for the Fourth Circuit affirmed the conviction of petitioners Dennis E. Pryba, Barbara A. Pryba, Educational Books, Inc. and Jennifer G. Williams.[1] That decision is not yet reported but is reproduced in the Appendix at pages A1-A26 *infra*. The orders and decisions of the United States District Court for the Eastern District of Virginia, at Alexandria, are also contained within the Appendix filed simultaneously with this Petition.

JURISDICTION

The judgment of the Fourth Circuit Court of Appeals affirming the convictions was entered on April 9, 1990. Jurisdiction of the United States Supreme Court is invoked under 28 U.S.C. § 1254(1) and Rule 13.1 of the Rules of this Court. Federal jurisdiction in the District Court is invoked under 18 U.S.C. § 3231.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment 1

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

United States Constitution, Amendment 8

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[1] B&D Corporation owned the stock of defendant, Educational Books. Video Shop, Ltd. and Marlboro News were subsidiaries of B&D Corporation. Each of these corporations was dissolved by the order of forfeiture imposed in this case (A-164).

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

Statutory provisions 18 U.S.C. §§ 1465, 1961, 1962 and 1963 are reprinted in the Appendix to this Petition.

STATEMENT OF THE CASE

Dennis E. and Barbara A. Pryba were convicted of one count of violating 18 U.S.C. § 1962(a) (participating in a pattern of racketeering activity); one count of violating 18 U.S.C. § 1962(c) (employed by a criminal enterprise engaged in racketeering activities); one count of violating 18 U.S.C. § 1962(d) (conspiracy to violate § 1962(a)); and seven counts of violating 18 U.S.C. § 1465(2) (transportation of obscene materials in interstate commerce for sale and distribution). Jennifer G. Williams was charged with all of the above and convicted of all, except for Count I, a violation of § 1962(a). Educational Books, Inc. was convicted of one count of violating 18 U.S.C. § 1962(a) and one count of violating 18 U.S.C. § 1962(d).

At the time this indictment was filed, November 13, 1987, the Prybas owned corporations which operated nine video rental stores and three bookstores in northern Virginia. The video stores stocked inventories of both general audience and sexually explicit adult videos. The bookstores sold "adult" fare — that is, sexually explicit magazines.

The Government alleged that an enterprise consisting of defendants and the various unindicted corporate entities had been formed in 1973 for the purpose of disseminating obscenity in violation of 18 U.S.C. § 1465 and §§ 18.2-274 and 18.2-381 of the Virginia Penal Code. The "pattern of racketeering activity" with which Educational Books, Inc. was charged was based on 15 prior obscenity pleas or convictions of that defendant under the Virginia Penal Code during the period of time from 1981-1984.

The remaining defendants were charged with a "pattern of racketeering activity" based on the rental or sale of four video tapes and the sale of nine magazines (which had been purchased by federal investigators).

The jury found that the four video tapes and six of the nine magazines were obscene. These materials were worth $105.30 (A-9).

Subsequent to conviction on November 10, 1987, the jury considered the forfeiture allegations and, on November 18, 1987, returned its forfeiture verdict, finding that "defendants had certain interests and property which afforded them a source of influence over the enterprise" and directing that all shares of stock in B&D Corporation, Educational Books, Inc., Marlboro News, Home Video Sales, Inc., and Video Shop, Ltd., be forfeited, together with corporate assets, certain real estate and motor vehicles (A-8-9). That verdict prompted the trial court's immediate issuance of an order of forfeiture and the Government thereafter

padlocked the doors of the three bookstores and the nine video rental shops.[2]

The Fourth Circuit affirmed the convictions and the order of forfeiture, ruling that the "constitutionality of criminal sanctions against those who distribute obscene materials is well established" (A-10) and that neither the forfeiture of businesses engaged in the sale of presumptively protected First Amendment material, nor the inclusion of obscenity as a RICO predicate offense, implicates either the First or Eighth Amendments to the United States Constitution.

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[2] Additionally, Dennis Pryba was sentenced to a term of three years on Count I and terms of ten years on Counts II and III. The sentences on Count II and III were suspended, and on those two counts, Pryba was sentenced to five years probation to begin after his sentence of imprisonment. On Counts IV through X, he was sentenced to concurrent terms of five years of probation on each count to run concurrently with the sentences on Counts II and III. Pryba was also fined $75,000 on Count II.

Barbara Pryba was sentenced to suspended terms of three years each on Counts I, II, IV, V, VI, VII, VIII, IX and X and a suspended term of ten years on Count III. She was sentenced to concurrent terms of three years probation on all counts and fined a sum of $200,000 on Count III.

Educational Books, Inc. was sentenced to pay fines of $100,000 each on Counts I and III.

Jennifer Williams was sentenced to concurrent terms of three years on Counts II through X. The sentences were suspended and Williams was sentenced to concurrent terms of probation of three years on each of those counts. Additionally, Williams was fined the sum of $250 on each of said counts for a total of $2,250.

REASONS FOR GRANTING THE WRIT

POINT I

THIS CASE IS THE FIRST TO RAISE THE QUESTION OF WHETHER POST-TRIAL FORFEITURE UNDER 18 U.S.C. §1961 *ET SEQ.* (RICO), IS PERMISSIBLE UNDER THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION

The practical and legal essence of this case lies in the fact that the sale of $105.30 worth of magazines and tapes found obscene has resulted in the forfeiture of three bookstores and nine video rental shops. The imposition of that sanction (which included, additionally, the forfeiture of all the remaining Pryba assets, with the exception of Barbara Pryba's home and automobile) (A-164), was by no means anomalous under 18 U.S.C. § 1963. Rather, that provision authorizes the Government to take and liquidate, not merely assets traceable to the obscenity but rather, any interest or property "constituting or derived from any proceeds which the person obtained, directly or indirectly, from racketeering activity." 18 U.S.C. § 1963.

Stated at its simplest, the use of obscenity as a predicate offense under the federal RICO statute will seriously hinder, if not obliterate altogether, the viability of businesses which are presumptively protected under the First Amendment to the United States Constitution. That foreseeably direct and dire consequence stands as an affront to the First Amendment and generates a host of practical questions as well; for those who operate the businesses affected, those who would prosecute them and finally, for the courts which are entrusted with the resolution of yet another facet of this "intractable problem of obscenity." *Interstate Circuit v. Dallas*, 390 U.S. 676, 704 (1968) (separate opinion).

The issues which are discussed in these pages are novel in that they have not appeared in the context of a post-trial RICO forfeiture. But recent cases of this Court have resolved related issues and have given intimations of questions to come, questions which arise in the tangible and undisputed factual context of this case. Mention of those cases highlights the appropriateness of a grant of certiorari herein.

In *Fort Wayne Books, Inc. v. Indiana*, ____U.S.____, 109 S.Ct. 916 (1989), this Court held that Indiana's RICO statute[3] permitting the pre-trial seizure of material presumptively protected under the First Amendment, was a constitutionally untenable prior restraint, imposed without a final judicial determination of the materials' obscenity: "Valid grounds for seizure is insufficient to interrupt the sale of presumptively protected books and films." *Id.* at 929.

Although the Court was urged to further determine whether a post-trial forfeiture was likewise unconstitutional, it declined to do so since there had been no post-trial forfeiture in *Fort Wayne* or its companion case, *Sappenfeld v. Indiana*. *Id.* at 928, fn.11. Justices Stevens, Brennan and Marshall, however, demurred; stating that they would extend the Court's holding to prohibit post-trial forfeitures "based on nothing more than a 'pattern' of obscenity misdemeanors." *Id.* at 939 (Stevens, J., dissenting in no. 87-614 and concurring in part and dissenting in part in no. 87-470).

Petitioners seek a grant of certiorari in *United States v. Pryba*, ____F.2d____ (4th Cir. 1990) (reproduced herein at A-1-26), since this case does squarely pose the question of whether the post-trial forfeiture of bookstores and their inventories, solely on the basis

[3] *See*, Ind. Code § 34-4 — 30.5-3(b) (1982).

of a pattern of past obscenity convictions, withstands constitutional scrutiny. *Fort Wayne Books, Inc. v. Indiana*, 109 S.Ct. at 938, fn.26.

Pryba is the first case prosecuted under the Federal Racketeering Influenced and Corrupt Organizations Act (RICO, 18 U.S.C. §§ 1961 *et seq.*), where the only predicate convictions were for crimes of obscenity.[4] The Court's determination of the validity of post-judgment forfeiture in this case will have enormous impact upon the future of RICO obscenity prosecutions, both state and federal.[5]

RICO provisions, in general, were drafted in order to provide prosecutors with "drastic methods" of curtailing undesirable criminal activity. *Russello v. United States*, 464 U.S. 16, 26-29 (1983); *United States v. Turkette*, 452 U.S. 576, 586-593 (1981). When, in 1984, obscenity was added to the list of predicate offenses, prosecutors were handed a potent new means of attacking obscenity and pornography and they vowed a commitment to employ the RICO obscenity legislation to the fullest.[6] Their use of post-trial forfeiture as their most effective means of reaching obscenity (and the presumptively protected as well) has been validated by the Fourth Circuit in *United States v. Pryba*, and thus, this Court's review of that decision and its analysis of the myriad

[4] In 1984, the list of RICO predicate offenses was expanded to include obscenity. *See*, 18 U.S.C. § 1961(1).

[5] As noted in *Fort Wayne Books*, 109 S.Ct. 916, several states have followed the lead of Congress in including obscenity as a predicate offense under their state RICO statutes. *See, e.g.*, Ariz. Rev. Stat. Ann. § 13-2301 (1989); Cal. Penal Code § 186.2(a)(20) (Deering Supp. 1989); Conn. Gen. Stat. § 53-394 (1989); Ga. Code Ann. § 16-14-3(9)(A)(xiii) (Supp. 1989); Ind. Code Ann. § 35-45-6-1 (Burns 1985). These states also permit post-trial forfeitures of property. *See*, Ariz. Rev. Stat. Ann. §§ 13-2313-13-2314 (1989); Cal. Penal Code § 186.3 (Deering 1985); Conn. Gen. Stat. Ann. § 53-397 (1989); Ga. Code Ann. § 16-14-7 (1988); Ind. Code Ann. § 34-4-30.5-2 (Burns 1986).

[6] *See*, for example, *New York Times*, January 12, 1988, Col. 1, Justice Department plans to front a new assault on obscenity via the federal RICO statute.

constitutional ramifications will have a substantial, concrete impact on the proper application of RICO to obscenity law and First Amendment precedent in general.

At present, the courts have come to no consensus regarding the validity of post-trial forfeiture. In *Western Business Systems, Inc. v. Slaton*, 492 F.Supp. 513 (N.D. Ga. 1980), the court upheld the Georgia RICO forfeiture statute noting (as did the Fourth Circuit in *Pryba*) that the forfeiture is unrelated to the expressive nature of books and magazines but occurs because they are items derived from crime, no matter how indirectly.

In contrast stands *Arizona v. Feld*, 155 Ariz. 88, 745 P.2d 146, 154-155 (Ariz. App. 1987), *cert. denied*, 485 U.S. 977 (1988). Writing that forfeiture provisions predicated upon an obscenity conviction were constitutionally permissible if they extended only to assets which were the "ill-gotten gains" of the racketeering activity, the Court held that any further stricture upon a defendant's assets would "restrict future, presumptively protected speech, rather than [punish] the distribution of unprotected speech in the past." Still other courts have opted to by-pass the question altogether (*see, e.g., Alexander v. Thornburg*, 713 F. Supp. 1278, 1294 (D. Minn. 1989), which further suggests that certiorari review is appropriate at this juncture.

The Court's grant of certiorari would also necessarily clarify the scope and proper application of the ruling in *Arcara v. Cloud Books, Inc.*, 478 U.S. 697 (1986). In *Arcara*, this Court determined that the one-year closure of a bookstore, based upon a past finding of criminal conduct, did not constitute a prior restraint of the sale and distribution of non-obscene materials. The Court said: "The legislation [New York's Nuisance and Abatement Statute, New York Public Health Law, § 2330 *et seq.*] providing the closure sanction was directed at unlawful conduct having nothing to do with books or other expressive activity." *Id.* at 707 (*but see*, concurring opinion of O'Connor, J., in *Arcara v. Cloud*

Books, 478 U.S. at 707, use of statute as pretext for suppressing indecent books requires analysis under the appropriate First Amendment standard of review).

United States v. Pryba, in contrast, does concern legislation specifically directed towards books and theaters — forms of expression which unequivocally enjoy the encircling mantel of First Amendment protections. Thus, despite the ruling below, petitioners contend that the First Amendment is implicated in this case in a way that it was not in *Arcara* and that it remains for this Court to illuminate the exact nature of the intersection between the Constitution and post-trial forfeiture and the proper mode of analysis to be applied.

Petitioners believe that because the legislation is so directly related to the regulation of pure speech, the validity of any restriction on that speech must be measured by the most stringent standards. *See, Bates v. Little Rock*, 361 U.S. 516, 524 (1960) ("[w]here there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling"). In adding obscenity to a statutory framework for the very purpose of employing forfeiture as a means of suppressing obscenity (the supposed handmaiden of organized crime), Congress also is directly (not incidentally) regulating one of society's most precious commodities: the written word. To seek to eradicate obscenity by means of forfeiture is to make a conscious decision to permanently suppress books and movies which are undeniably protected by the First Amendment. The legislative decision to take that ominous step demands the forceful response that this Court has historically made when First Amendment freedoms are directly jeopardized by a governmental body: "regulatory measures ... no matter how sophisticated, cannot be employed in purpose or in effect to stifle, penalize, or curb the exercise of First Amendment rights." *Louisiana ex rel Gremillion v. NAACP*, 366 U.S. 293, 297 (1961).

In *Arcara v. Cloud Books*, 478 U.S. 697, this Court held that First Amendment scrutiny would be applied to a statute regulating conduct which had an expressive element or to statutes which, although having no such expressive element "impose[d] a disproportionate burden on those engaged in protected First Amendment activities." *Id.* at 704. Relying upon that rationale, the Fourth Circuit, in *Pryba*, predicated its decision upon the fact that because obscenity is itself a crime, the contours of the punishment imposed for the criminal activity need not be tested by First Amendment standards. The Court said: "there is nothing so unusual about obscenity convictions that they may not be used as RICO predicate offenses. There is no constitutional protection for materials adjudged to be obscene" (A-10).

Although obscenity itself is a crime, a past finding of obscenity has never, in this Court's view, justified a ban on further communicative offerings on the basis of that past obscenity. Thus, in *Vance v. Universal Amusement Co., Inc.*, 445 U.S. 308 (1980), the Court declared that the closure of a motion picture theater on the ground that the theater had, in the past, shown obscene films, created an unconstitutional prior restraint "of indefinite duration on the exhibition of motion pictures that have not been finally adjudicated to be obscene." *Id.* at 309.

Should the Court, however, find that the criminal conviction of obscenity removes the *Pryba* case from the *Vance* paradigm, a question still arises as to whether the First Amendment is not implicated either by virtue of the fact that the conduct sought to be regulated has an expressive element (triggering a variant of the test of *United States v. O'Brien*, 391 U.S. 367 (1968)), or, because the statute imposes a disproportionate burden on those engaged in First Amendment activities. In *Minneapolis Star and Tribune Co. v. Minneapolis Commissioner of Revenue*, 460 U.S. 575 (1983), the Court ruled that even when legislation is not directed towards speech or activity with an expressive element, the First

Amendment is drawn into play where that legislation has the inevitable effect of imposing its burden upon those, such as the petitioners in this case, whose very businesses, by virtue of the books and magazines sold therein, receive special protections under the First Amendment. *Fort Wayne Books v. Indiana*, 107 S.Ct. 916, and *Arcara v. Cloud Books*, 478 U.S. 697, each — the first, directly; the second, by implication — leave open the question of how the First Amendment is affected by application of RICO forfeiture to obscenity. The inevitable tension between the Constitutional guarantees and the organized crime statute poses practical and legal problems which are presented in tangible form in this case. The grant of certiorari would, therefore, be appropriate.

POINT II

REFUSAL TO GRANT CERTIORARI WILL BE TAKEN AS TACIT APPROVAL OF A DECISION WHICH PERMITS THE IMPOSITION OF A PRIOR RESTRAINT UPON PROTECTED EXPRESSION

Although a denial of certiorari cannot be deemed a decision on the merits, *United States v. Carver*, 260 U.S. 482, 490 (1923), it is generally construed as approval of the decision below. *See, e.g., Simmons v. Union News Co.*, 382 U.S. 884, 886 (1965) (Black, J., dissenting from denial of certiorari). The repercussions of such a denial in this case would dismantle, without benefit of any explanation, the body of obscenity jurisprudence which the Supreme Court has so painstakingly crafted.

If post-judgment forfeitures are permitted upon the basis of obscenity convictions, prosecutors will have achieved a convenient method by which to rid society of all that it deems undesirable: the sexually explicit as well as the obscene. The constitutional pitfall of that endeavor, however, is that this Court has stated repeatedly that, while obscenity itself is not entitled to the protections of the First Amendment, sex and obscenity are not synonymous and the former, a topic of universal interest and concern, cannot be restricted under the guise of repressing the obscene:

> The door barring federal and state intrusion into this area cannot be left ajar; it must be kept tightly closed and opened only the slightest crack necessary to prevent encroachment upon more important interests. It is therefore vital that the standards for judging obscenity safeguard the protections of freedom of speech and press for material which does not treat sex in a manner appealing to prurient interest.

Roth v. United States, 354 U.S. 476, 488 (1957).

The Court's continued recognition that the sexually explicit must not be confused with the legally obscene has led to its caveat that the separation of one from the other necessitates the employment of sensitive tools, *Speiser v. Randall*, 357 U.S. 513, 525 (1958), and its exhortation to the courts that "a state is not free to adopt whatever procedures it pleases for dealing with obscenity without regard to the possible consequences for constitutionally protected speech." *Marcus v. Search Warrants of Property*, 367 U.S. 717, 731 (1961).

In *Marcus v. Search Warrants of Property*, the Court invalidated state statutory procedures permitting the pre-trial seizure of material thought to be obscene on the strength of the conclusory assertions of a single police officer. In condemning this process, which resulted in the seizure of thousands of copies of presumptively protected material, the Court reasoned that, for purposes of search and seizure, obscenity was not the equivalent of gambling paraphernalia or other contraband and could not be treated as such. *Id.* at 730.

While, admittedly, *Marcus* concerned a pre-trial seizure, the essence of the Court's holding was its fear that, absent procedures designed to "focus searchingly" on the question of obscenity, the non-obscene would be suppressed along with publications ultimately determined to be illegal. "Procedures which sweep so broadly and with so little discrimination are obviously deficient in techniques required by the Due Process Clause of the Fourteenth Amendment to prevent erosion of the constitutional guarantees." *Marcus v. Search Warrants of Property*, 367 U.S. at 733.

Should this Court allow the decision below to stand, on the ground that forfeiture is a legitimate criminal sanction imposed upon conviction, the essence of each of the precedents noted above would be negated. The starting point of obscenity law has been the recognition that whatever the basis for the regulation,[7] great care must be used in structuring the processes so that books or magazines, movies or videos will not be banned because of the censor's fervid belief that they undermine our morals. Surely the breadth and substance of that principal should not be diminished by a ruling that permits the destruction of books because a shopkeeper has been found guilty of past obscenity convictions.

This Court has been loathe to reject its constant and terrible burden of defining obscenity with care and precision and of applying that definition to the masses of material pressed upon the Court. "Such an abnegation of judicial supervision in this

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[7] Be it that of the zoning power, *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986); the penal statute, *Miller v. California*, 413 U.S. 15 (1973); or the administrative licensor, *Southeastern Promotions v. Conrad*, 420 U.S. 41 (1975).

field would be inconsistent with our duty to uphold the constitutional guarantees." *Jacobellis v. Ohio*, 378 U.S. 184, 187-188 (1964) (opinion of Brennan, J.). Petitioners submit that a refusal to accept this case for review would be a similar derogation of duty when the ruling below stands as an affront to perhaps the most prized of our constitutional guarantees, a freedom of expression, which, while not boundless, is not prematurely and unduly stifled.

POINT III

THE DECISION BELOW AUTHORIZES THE IMPOSITION OF A PRIOR RESTRAINT OR, ALTERNATIVELY, AN OVERLY BROAD AND UNCONSTITUTIONAL SUBSEQUENT PUNISHMENT

A. Prior Restraint.

In *Arcara v. Cloud Books*, this Court held that the State's one-year closure of the bookstore would not be a prior restraint since: (1) the closure would not prevent the sale of the material at another location; and (2) the closure was not being sought "on the basis of an advance determination that the distribution of particular materials is prohibited — indeed, the imposition of the closure order has nothing to do with any expressive conduct at all." *Arcara*, 478 U.S. at 706, n.2.

This case stands in contrast to *Arcara* in that both indicia of a prior restraint are present. As noted earlier, the legislative decision to debilitate organized crime through its alleged connection to obscenity was also a deliberate decision to substantially restrict free expression. The decision to prosecute obscenity under a statute mandating forfeiture of the defendant's assets, which presumably would usually include bookstores,[8] was also a decision directly affecting the sale and availability of materials protected under the First Amendment. As such, post-trial forfeiture predicated upon an obscenity conviction is indubitably legislation intimately related to the regulation of free expression.

That the situation of obscenity within the RICO construct bespeaks a deliberate legislative indifference to the fate of constitutionally safeguarded materials is also reflected in the statements of Senator Jesse Helms, sponsor of the legislation.[9] In seeking the inclusion of obscenity into RICO, Senator Helms revealed clearly that he was concerned not only with the symbiosis between purveyors of obscenity and organized crime; but also that he supported the legislation's passage because of its moral component. Helms stated:

> In essence, pornography degrades the dignity and worth of human beings by presenting a false picture of human sexuality. It holds sexuality out as an end in itself, totally removed from its proper and normal place as a means in marriage for conjugal love and the procreation of children. Pornography demeans because it rejects the true meaning of sexuality.

130 Cong. Rec. 433 (January 30, 1984).

It is evident that, if this legislation was not passed specifically for the purpose of removing the sexually explicit but non-obscene, the fact that closure of adult bookstores would inevitably follow was deemed a salutary by-product of the statutory scheme.

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[8] *See, Fort Wayne Books, Inc. v. Indiana*, 109 S.Ct. at 937 (Stevens, J., dissenting in no. 87-614 and concurring in part and dissenting in part in no. 87-470), noting that "the enforcement of Indiana's RICO/CRRA statutes has been primarily directed at adult bookstores."

[9] While the legislative purpose of a statute may, perhaps, not be assumed from the statements of a supporter, surely it is proper to consider those statements as positing at least some of the foremost concerns and motivations standing behind the legislation.

Thus, this case is far different from *Arcara* where the nuisance law did not have the direct and irrevocable consequence of foreclosing the community from access to publications with both a general and adult content. Here, the resulting forfeiture of material protected under the First Amendment was not incidental to the legislation but a directly identifiable consequence of it.

Nor, for purposes of analyzing the issue of prior restraint, does it matter that the restraint occurs after an obscenity conviction and without the issuance of any injunction or order actually suppressing that which has not been determined obscene. A prior restraint can result from an informal system of censorship as well as from a tangible injunction or order.

In *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1968), there was no actual suppression of speech prior to its publication or dissemination. Rather, the "Rhode Island Commission to Encourage Morality in Youth" informally encouraged book sellers to remove certain objectionable volumes from their shelves if they did not wish the Commission to attempt to initiate obscenity prosecutions. The Supreme Court held the activities of the Commission unconstitutional.

Although recognizing that the Commission was not actually suppressing or regulating obscenity, the Court ruled that, nevertheless, the Commission was guilty of an informal method of censorship:

> "We are not the first court to look through forms to the substance and recognize that informal censorship may sufficiently inhibit the circulation of publications to warrant injunctive relief."

Id. at 67.

Petitioners submit that an equivalent type of informal censorship occurs when post-trial forfeiture is permitted. Few book sellers will have either the temerity or the fiscal resources to face a RICO indictment when the result may mean complete and final closure of their businesses. The chilling effect is far more onerous than that sanctioned by this Court in past cases.[10] The difference is in the type and degree of punishment imposed. While, of course, all criminal obscenity penalties will have an inhibitory effect on the distribution of protected material, the forfeiture of a business and its assets constitutes the most extreme form of suppression, both because of the final dismantling of the store and also, because the books themselves must be forfeited to the Government. Our right to buy and read what we wish (except for the very narrow band of obscenity) is so precious and so firmly entrenched in our concept of a free society, that a statute which permits the Government to take and destroy what it concedes are legal and legitimate publications, must be deemed pernicious. It is for that very reason that the concept of prior restraint remains intrinsic to First Amendment law: "a free society prefers to punish the few who abuse rights of speech after they break the law than to throttle them and all others beforehand." *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 559 (1975).

The forfeiture provisions of 18 U.S.C. § 1963(a) are also distinguishable from the closure in *Arcara* because, in that case, the book seller remained free to continue his business at another location. Conversely, the federal forfeiture statute does not operate as simply a closure of the locus of the bookstore — instead, it necessitates the sale of the building, destruction (or at least transfer to the

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[10] For instance, *Smith v. United States*, 431 U.S. 291, 296, n.3 (1977) (5-year prison term and $5,000 fine for first offense; 10-year term and $10,000 fine for each subsequent offense); *Ginzburg v. United States*, 383 U.S. 463, 464-465, n.2 (1966) (5-year prison term and $5,000 fine).

Government) of the assets of the physical plant, including the presumptively protected material and the actual hardware, cash registers and the like.

In *Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981), the local government forbade live entertainment within the borough. The Court held that although the zoning power is "undoubtedly broad," it still must be exercised within constitutional limits and thus, could not legitimately infringe upon protected First Amendment activity unless its regulations were narrowly drawn and furthered sufficiently substantial Government interests. *Id.* at 68. Because the prohibition against any live entertainment was neither a minimal nor incidental burden on First Amendment values, the Court overturned it.

So, too, in this case, RICO forfeiture imposes an inordinately heavy burden on free expression. Moreover, a primary effect of the legislation will be the virtual disappearance of adult bookstores which provide a form of entertainment which not only receives the full protection of the First Amendment, *see, Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975), but also is in some demand by the general public. *See, Fort Wayne Books v. Indiana*, 109 S.Ct. at 936, n.21 (Stevens, J.).

Given that the penal statute at hand was drafted in order to regulate obscenity and given its deleterious effect on the dissemination and distribution of protected materials, petitioners submit that a prior restraint has been effected and implore this Court to grant certiorari in order to review and hopefully, obviate that result.

B. Subsequent Punishment.

Should this Court be of the view that no prior restraint results from imposition of forfeiture subsequent to an obscenity conviction, it still remains to be considered whether the punishment of

forfeiture is not itself an unconstitutional and overly broad response to the fight against organized crime/obscenity.

Despite the Fourth Circuit's holding that the First Amendment was not implicated since the defendant had been afforded full due process rights at a criminal trial, this Court has ruled explicitly that:

> "First Amendment protection reaches beyond prior restraints" (*Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 101 (1979)), and that:
>
> > "Even when a state attempts to punish a publication after the event it must nevertheless demonstrate that its punitive action was necessary to further the state interests asserted." *Id.* at 102, citing *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 843 (1978).

Given those precepts, if the case at bar is deemed entirely outside the realm of prior restraint, petitioners ask the Supreme Court to grant the writ of certiorari in order to assess whether post-trial forfeiture can ever comport with First Amendment doctrine, whether the Government's interests in suppressing organized crime are sufficiently furthered by forfeiture, and finally, whether the means chosen to advance those interests are narrowly enough drawn to satisfy the demands of the Constitution.

The breadth of the forfeiture statute is underscored by its very language which demands the forfeiture of any interest in any enterprise established in violation of 18 U.S.C. § 1962 as well as any property constituting or derived from any direct or indirect proceeds obtained from racketeering activity.

The amorphous quality of that language precludes a finding that the legislation was narrowly tailored to meet First Amendment concerns. On a practical level, it means that once the Government secures its two obscenity convictions (perhaps based on

facts as essentially innocuous as the sale of two copies of a hard core magazine), the business concern selling those magazines (again, quite possibly the general corner store or bookstore chain), will be padlocked and the books and expressive materials contained therein transferred to the Government. That result is not unlikely under the RICO legislation and the probability of its occurrence, as well as its horrific scope, should demand this Court's attention. For despite all protestations that the statute is constitutional as a criminal penalty, one which will be utilized in even-handed fashion and with discretion, this Court has always eschewed facile labels as a means of constitutional analysis. "As far back as the decision in *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 720-721 (1931), this Court has recognized that the way in which a restraint on speech is 'characterized' under state law is of little consequence." *Fort Wayne Books, Inc. v. Indiana*, 109 S.Ct. at 929. An unlawful prior restraint cannot escape constitutional analysis merely by recharacterization of the restraint as a sanction for a pattern of racketeering activity.

Thus, while conceivably the statute will have some efficacy in deterring obscenity, whether or not connected to organized crime, petitioners submit that it cannot pass constitutional muster when the deleterious "operation and effect," of the statute (in this case the closure of nine video rental stores and three bookstores) so heavily outweighs the Government's interests asserted. As stressed by this Court in *NAACP v. Button*, 371 U.S. 415, 433 (1963), the danger of overbroad legislation is its "susceptibility to sweeping and improper application." Because the penal sanction under review seeks to control organized crime through the wholesale suppression of expression, its viability raises significant constitutional questions of overbreadth, questions which should be resolved by this Court.

POINT IV

THERE IS A DIRECT CONFLICT AMONG THE CIRCUITS AS TO WHETHER THE EIGHTH AMENDMENT REQUIRES A PROPORTIONALITY REVIEW OF THE FORFEITURE OF A DEFENDANT'S INTEREST IN A RICO ENTERPRISE

The Eighth Amendment guarantees that punishment will be proportionate to the crime of which a defendant has been convicted. *Solem v. Helm*, 463 U.S. 277 (1983). However, the Fourth Circuit has ruled that the Eighth Amendment does not require a proportionality review of any sentence less than life imprisonment without the possibility of parole. *United States v. Pryba* (A-18); *United States v. Whitehead*, 849 F.2d 849, 860 (4th Cir. 1988); *United States v. Rhodes*, 779 F.2d 1019, 1027-28 (4th Cir. 1985), *cert. denied*, 476 U.S. 1182 (1986).

Thus, although the petitioners in the instant case argued to the District Court and the Court of Appeals that the forfeiture sought was disproportionate to the crime in that the income derived from the alleged pattern of racketeering activity amounted to only an infinitesimal percentage of petitioners' legitimate income, both courts declined to conduct a proportionality review (A-18).

In direct conflict with this position, the Ninth Circuit has held that where a plaintiff makes a prima facie showing that forfeiture may be excessive, the district court must make a determination that the interest ordered forfeited is not so grossly disproportionate to the offense committed as to violate the Eighth Amendment. *See, United States v. Busher*, 817 F.2d 1409 (9th Cir. 1987); *and see, United States v. Horak*, 833 F.2d 1235, 1251 (7th Cir. 1987) and, *United States v. Walsh*, 700 F.2d 846, 857 (2d Cir. 1983).

The Fourth Circuit, however, has reasoned that since in a RICO case the magnitude of the forfeiture is directly keyed to "the magnitude of the defendant's interest in the enterprise conducted in violation of the law," forfeiture under § 1963 is *per se* proportional. *United States v. Grande*, 620 F.2d 1026 (4th Cir.) *cert. denied*, 449 U.S. 830, *and*, 449 U.S. 919 (1988). The Ninth Circuit, in particular, has rejected that rationale as noted in this excerpt:

> The Fourth Circuit misapplied the eighth amendment's requirement of proportionality. That the statute ties the amount forfeited to a defendant's stake in an enterprise that violated the law merely states the issue. As we have previously noted, RICO's impressive breadth, and the interplay of its substantive and punitive provisions, may result in forfeitures of vast amounts of property as a result of relatively minor offenses. In any one case the amount forfeited may have no relationship whatsoever to the severity of the wrong committed.

United States v. Busher, 817 F.2d at 1414-1415, n.9.

The disagreement between these judicial camps on a novel issue with significant constitutional overtones should, petitioners submit, compel this Court's review.

POINT V

THIS COURT'S GUIDANCE REGARDING THE ADMISSIBILITY OF EXPERT TESTIMONY IS NEEDED TO RESOLVE CONFLICTS AMONG THE LOWER COURTS

A. Public Opinion Polls

The defense in this case proffered an expert to testify as to the results of a public opinion poll conducted for this case.[11] Although the lower court did not find error in the methodology used to conduct the poll, it excluded the results upon its determination that the questions (1) were not relevant, and (2) did not completely cover the content of the materials on trial.

The questions set forth in the survey were nearly identical to those used across the nation. However, state and federal courts have reached different conclusions as to the admissibility of these surveys. For example, in *People v. Nelson*, 410 N.E.2d 476; *Saliba v. State*, 475 N.E.2d 1181; and *Carlock v. State*, 609 S.W.2d 787 (Tex. Crim. App. 1980), the courts admitted survey questions and results nearly identical to those posed here. On the other hand, the courts in *State v. Anderson*, 366 S.E.2d 459; *Flynt v. State*, 264 S.E.2d 669; *People v. Thomas*, 37 Ill. App. 3d 320, 346 N.E.2d 190 (1976), and the lower court here, ruled simi-

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[11] The survey questions asked were:

(1) whether he/she thought that the portrayal of "nudity and sex" and materials available to adults only had become more or less acceptable in recent years;

(2) whether he/she agreed or disagreed with the statement that adults who want to should be able to obtain and view materials depicting "nudity and sex;"

(3) whether he/she believed that he should be able to buy or rent materials depicting "nudity and sex;" and

(4) whether he/she agreed or disagreed with the statement that adults who want to should not be able to buy or rent materials depicting "nudity and sex."

lar questions and results inadmissible. These conflicting decisions result from court confusion regarding contemporary community standards and how they are gauged and thus, the assistance of this Court is sought.

B. Comparable Materials

The court in *Womack v. United States*, 294 F.2d 204 (D.C. Cir.) *cert. denied*, 365 U.S. 859 (1961), introduced the concept that the existence of comparable materials may be relevant to a showing that works are acceptable in the community. Since the 1961 *Womack* decision, numerous courts have faced the issue of whether certain comparable materials are admissible in an obscenity prosecution. The result is that:

> There has been a considerable amount of confusion in the courts as to the admissibility and function of comparison evidence in obscenity cases. Some jurisdictions have held it reversible error to reject such evidence, while others exclude it rather summarily.

United States v. Womack, 166 U.S. App. D.C. 35, 41, 509 F.2d 368, 374 (D.C. Cir. 1974), *cert. denied*, 422 U.S. 1022 (1975); *comparing, Woodruff v. State*, 11 Md. App. 202, 273 A.D.2d 436 (1971); *[and] Yudkin v. State*, 229 Md. 223, 182 A.D.2d 798 (1962); *In re Harris*, 56 Cal. 2d 879, 366 P.2d 305 (1961) *with, State v. Jungclaus*, 176 Neb. 641, 126 N.W.2d 858 (1964); *[and] People v. Finkelstein*, 11 N.Y.2d 300, 183 N.E.2d 661 (1961); and in the federal courts *comparing, Kahm v. United States*, 300 F.2d 78, 84 (5th Cir. 1962) *with Miller v. United States*, 431 F.2d 655, 659 (9th Cir. 1970); *and, see, United States v. Pinkus*, 579 F.2d 1174, 1175 (9th Cir. 1978) ("The admissibility of 'comparables' in obscenity prosecutions has been a subject of confusion.")

In addition to confusion on the threshold question of admissibility of comparable material evidence, disputes have also arisen as to the foundational basis required for admission of such evi-

dence. Specifically, various lower courts have seized on the words of this Court in *Hamling v. United States*, 418 U.S. 87, 125 (1974), that "availability of similar material ... does not automatically make [it] admissible." Other courts have recognized that widespread community availability may be accepted as circumstantial evidence of contemporary community standards. *See, e.g., United States v. 2,200 Paper Back Books*, 565 F.2d 566, 571 (9th Cir. 1977); *Keller v. State*, 606 S.W.2d 931, 933-934 (Tex. Cr. App. 1980); *United States v. Various Articles of Obscene Merchandise, Schedule No. 2102*, 709 F.2d 132, 137 (2d Cir. 1983).

In the case at bar, the defense offered the testimony of an expert who had purchased many sexually explicit magazines and videotapes (comparable to those charged in this case) from diverse locations throughout the District, including general bookstores, drugstores, news stands, grocery stores, and candy and gift shops. Based on his extensive study, the defense attempted to introduce the comparable materials so purchased. In excluding the evidence, the trial court complained that the information "although perhaps reflecting availability of the materials surveyed, fails to evidence community acceptance" (A-110). In so doing, the court ignored clear precedent establishing that widespread community availability is probative of community acceptance.

C. Ethnographic Study

In a further attempt to educate the jury as to contemporary community standards, the defense wished to present the testimony of Dr. Joseph Scott, a sociologist, criminologist and associate professor at Ohio State University with a background in statistical methodology. He had conducted an ethnographic study of the attitudes of the relevant adult community toward sexually explicit material. An ethnographic study was described as a recognized methodology for making a qualitative assessment of community standards in a given area.

During the course of his ethnographic study, Dr. Scott visited 75 video stores to determine the pervasiveness of sexually explicit magazines and books; interviewed proprietors of these establishments to determine the acceptability of the materials and spoke with the editors of 17 newspapers and other publications concerning complaints about obscenity or pornography during the year prior to trial. The information gathered reflected the acceptable nature of sexually explicit materials in the relevant geographic area.

The judicial confusion regarding availability versus acceptability of sexually explicit materials detailed in Point V, Sub. B, *supra*, resulted in the exclusion of this expert's valuable information. The lower court again failed to recognize that body of case law which acknowledges that widespread community availability is probative of community acceptance and petitioners thus ask the Court to review this question.

POINT VI

CONFUSION ABOUNDS AS TO WHETHER CONTEMPORARY COMMUNITY STANDARDS ARE TO BE MEASURED BY AN ACCEPTANCE OR TOLERANCE STANDARD

A recurring argument in obscenity prosecution centers around whether contemporary community standards are to be measured by an acceptance standard or a tolerance standard.[12] Defendants invariably cite to this Court's repeated use of the word, tolerance, when describing contemporary community standards. See *New*

[12] The lower court here specifically charged the jury that "contemporary community standards are set by what is, in fact, accepted in the adult community as a whole, and not by what the community merely tolerates. ..." (A-21).

York v. Ferber, 458 U.S. 747, 761, n.12 (1982); *Smith v. United States*, 431 U.S. 291, 305 (1977); *Jacobellis v. Ohio*, 378 U.S. at 194.

However, the lower court held here, as have other courts, that contemporary community standards are to be measured by what is in fact accepted in the community as a whole and not what is merely tolerated. *See, e.g., United States v. Battista*, 646 F.2d 237, 245 (6th Cir.), *cert. denied*, 454 U.S. 1046 (1981), and, *Sedelbauer v. State*, 428 N.E.2d 206, 210-211 (Ind. 1981), *cert. denied*, 455 U.S. 1035 (1982).

These divergent views on a crucial issue which repeatedly surfaces in obscenity prosecutions requires resolution by this Court.

POINT VII

A CONFLICT EXISTS AMONG THE CIRCUITS AS TO THE ELEMENTS OF 18 U.S.C. § 1962(d)

Petitioners were convicted of RICO conspiracy on the basis of jury instructions which did not require that the jury find that petitioners had *personally* agreed to commit two predicate acts in a RICO context. The court in *United States v. Winter*, 663 F.2d 1120 (1st Cir. 1981), *cert. denied*, 460 U.S. 1011 (1983), specifically outlined the two predicate act issue as follows. Although Section 1961(5) states that a "pattern of racketeering activity" requires at least two acts of racketeering activities;

> The statute, however, does not make clear the extent of the activity in which each defendant must engage to be culpable as RICO conspirators: must each RICO conspiracy defendant agree that someone in the enterprise will commit two predicate crimes, must each member agree to commit two

such acts individually, or must each member actually commit two such acts individually?

Id. at 1136.

In answering this question, the Circuits are clearly divided. The First Circuit in *United States v. Winter*, determined that protection to those who might otherwise be convicted through guilt by association would be afforded by the minimum requirement that each defendant be shown to have personally agreed to commit two or more specified predicate crimes. Similarly, the Second Circuit required proof that the defendant, himself, at least agreed to commit two or more predicate crimes. *United States v. Ruggiero*, 726 F.2d 913 (2d Cir.), *cert. denied sub nom, Rabito v. United States*, 469 U.S. 831 (1984).

Other courts have required only that each defendant agree that members of the conspiracy will violate RICO through the commission of two prescribed acts. *See, United States v. Leisure*, 844 F.2d 1347, 1367 (8th Cir.), *cert. denied*, ____U.S.____, 109 S.Ct. 324 (1988); *United States v. Joseph*, 781 F.2d 549, 554 (6th Cir. 1986); *United States v. Neapolitan*, 791 F.2d 489, 491 (7th Cir.), *cert. denied*, 479 U.S. 940 (1986); *United States v. Adams*, 759 F.2d 1099, 1116, *cert. denied*, 474 U.S. 971 (1985); *United States v. Tille*, 729 F.2d 615, 619 (9th Cir. 1984), *cert. denied*, 469 U.S. 845 (1984); *United States v. Carter*, 721 F.2d 1514, 1528 (11th Cir. 1984).

The Fourth Circuit has joined the ranks of the latter courts (A-24). Resolution of the conflict among the Circuits will avoid its inevitable recurrence in all future RICO prosecutions.

POINT VIII

THIS COURT HAS NOT DETERMINED IF PRIOR STATE COURT CONVICTIONS ARE ADMISSIBLE TO PROVE RICO PREDICATE ACTS

No controlling authority exists to settle the question of whether a prior state court conviction is admissible for purposes of proving the predicate acts of racketeering activity necessary to establish a RICO violation. Although the court below upheld the introduction of various state court convictions of petitioner Educational Books, Inc.,[13] the legality of such action has not been considered by this Court and is seemingly in direct conflict with dual sovereignty considerations.

Since the concept of dual sovereignty prohibits the use of state acquittals in the federal context as a bar to prosecution, *Bartkus v. Illinois*, 359 U.S. 121 (1959), this Court should rule, as the logical converse, that the government cannot prove predicate acts for purposes of a federal RICO conviction through state court judgments.

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[13] The District Court's decision, referred to by the Fourth Circuit, relied on two rulings which upheld use of a defendant's state court plea in a later non-RICO federal prosecution, *United States v. Andreadis*, 366 F.2d 423 (2d Cir. 1966) and *United States v. Myers*, 49 F.2d 230 (4th Cir.), *cert. denied*, 283 U.S. 866 (1931), and two decisions holding a prior federal court conviction admissible in another federal proceeding to establish a RICO predicate act. *United States v. Erwin*, 793 F.2d 656 (5th Cir. 1986); *United States v. Persico*, 621 F.Supp. 842 (S.D.N.Y. 1985).

POINT IX

CONTRARY TO ESTABLISHED LAW, THE COURT SEVERELY LIMITED *VOIR DIRE* AND PREVENTED PROPER EXERCISE OF DEFENDANT'S PREEMPTORY CHALLENGES

This Court has long recognized the right of preemptory challenges as "one of the most important rights secured to the accused," *Pointer v. United States*, 151 U.S. 396, 408 (1894). In obscenity matters, the Court has specifically recognized that it is helpful to know "how heavily the juror has been involved in the community." *Smith v. United States*, 431 U.S. at 308.

To this end, petitioners requested that the trial court question to what community organizations, if any, the prospective jurors belonged. Refusing this request, the trial court advised that, at most, it would ask whether the prospective juror belonged to any community organization (without requiring that they be listed) or if s/he belonged to no community organizations. However, the trial court in fact did not ask any such question, and its refusal to do so severely impaired the defendants' ability to exercise intelligently their preemptory challenges. Review is therefore merited.

CONCLUSION

For the foregoing reasons, petitioners respectfully request that the Court grant this petition for writ of certiorari.

Respectfully submitted,

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